

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROY E. STILL)	
Claimant)	
)	
VS.)	
)	
TEMPORARY EMPLOYMENT CORP.)	
Respondent)	Docket No. 1,034,853
)	
AND)	
)	
TRANSPORTATION INSURANCE CO.)	
Insurance Carrier)	

ORDER

Respondent and its insurance carrier (respondent) request review of the December 5, 2007 Order entered by Administrative Law Judge Kenneth J. Hursh (ALJ).

ISSUES

The ALJ reinstituted temporary total disability (TTD) benefits after he concluded that claimant's actions in connection with respondent's offer of part-time, accommodated employment did not foreclose his entitlement to continued benefits. And because respondent had unilaterally ceased TTD payments, he imposed a penalty of \$100 per week for every week the TTD benefits were unpaid.¹

Respondent contends the ALJ erred by ordering the TTD to continue and in ordering penalties. Respondent maintains that its offer of employment fell within the claimant's restrictions and based upon the language of the earlier preliminary hearing, claimant was no longer entitled to TTD benefits. Thus, respondent's decision to terminate benefits was appropriate. And penalties are correspondingly inappropriate.

Claimant argues that the order should be affirmed all respects.

¹ As of the time of the preliminary hearing, that period was 14.57 weeks.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

On August 1, 2007, the parties entered into an agreed order which provided as follows:

Based on the statements of counsel, the respondent and insurance carrier shall pay the claimant 9.5 weeks of temporary total disability benefits at the rate of \$213.34 per week, a total of \$2,026.73. The respondent and insurance carrier shall continue to pay temporary total benefits from the date of this order if the respondent cannot provide the claimant accommodated employment within the claimant's work restrictions.²

Thereafter, respondent began paying TTD benefits and continued to do so until August 23, 2007. But on August 24, 2007 TTD benefits were suspended based on respondent's offer of part-time, accommodated employment and claimant's alleged refusal to perform this job. Claimant served the appropriate demand notice and on December 4, 2007 the issue of penalties came before the ALJ.

During that hearing respondent's representative, Christi Clark, described a part-time job that in her view, fell within claimant's restrictions. Claimant conceded that a job was offered, but explained that while he was willing to do the job, he wanted to delay his start for one day so that he could obtain the appropriate clothing.

The facts and circumstances surrounding this offer, whether it truly met claimant's restrictions, whether claimant had the appropriate attire for that job (and told respondent this), how long that job was expected to continue, when claimant was willing to start and why claimant desired to delay his start date, are all in dispute.

Following the hearing the ALJ issued an Order. The ALJ set forth the facts in great detail and the Board adopts them as its own avoiding the need to unnecessarily repeat them again.

The ALJ distilled the issue as follows:

. . . The ultimate question of fact is whether this one time, part time job offer amounted to the respondent providing the claimant accommodated employment. It is a close call, but it is held that this single offer, which the claimant was willing to accept with a one work day delay, was not accommodated employment provided

² ALJ Order (Aug. 1, 2007).

to the claimant. The claimant's actions were not so egregious that one can say he frittered away any chance for accommodated work with the temporary agency.³

Because the ALJ concluded that respondent inappropriately suspended claimant's TTD benefits, he imposed a penalty under K.S.A. 44-512a in the sum of \$100 for each week that those benefits were and remained suspended.

The Board has considered the parties' arguments and the underlying facts and circumstances and finds the ALJ's Order should be affirmed. The respondent's argument that claimant's failure to accept the job and begin working immediately is tantamount to a lack of good faith, similar to the good faith required of those who seek permanent partial general (work) disability benefits under K.S.A. 44-510e(a)⁴ is not persuasive. First, that analysis has recently been called into question by the appellate courts.⁵ These cases suggest that statutes should be construed strictly and the concept of "good faith" are not to be grafted on to those statutes.

Second and independent of that reasoning, the Board agrees with the ALJ's analysis that claimant's request (albeit for a less than compelling reason) to delay the start of his employment did not, under these facts and circumstances, foreclose his entitlement to TTD benefits. Claimant explained that he had no money to purchase the necessary clothes for the job he was being offered and expected to start immediately. And he asked for a day to reach his father (who was tending to his dying wife) so that he could purchase those items. That same weekend, claimant had a friend arriving in town. From all appearances, Ms. Clark focused on the fact that claimant had a friend coming to town over all other facts and took claimant's request as a "refusal" to perform the part-time accommodated job. Like the ALJ, the Board is not persuaded that claimant's request for a one day delay was unreasonable and somehow invalidated his right to TTD benefits.

Respondent's obligation under the preliminary hearing Order was to provide TTD until an accommodated job that fell within claimant's restrictions could be provided. While there is some testimony that Ms. Clark thought this job was within claimant's restrictions, it was part-time and the duration of that job is unknown. Most importantly, however, claimant was willing to do the job, he just wanted to start a day later, allowing him the chance to get the appropriate clothing. It is simply too onerous to say that claimant's desire to delay his return to work by one day vitiates respondent's TTD obligations.

³ ALJ (Dec. 5, 2007) at 2.

⁴ *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁵ *Leroy M. Stephen v. Phillips County*, ___ Kan. App. 2d ___, 174 P.3d 452 (2008) (Court of Appeals Decision, No. 97,254); *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007).

The Board agrees with the ALJ and his Order is affirmed in all respects.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated December 5, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kala Spigarelli, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge